Twitter Thread by Adil Haque



Adil Haque
@AdHaque110

1. This THREAD has everything.

Jus cogens.

Hans Kelsen.

The Israel-Egypt conflict.

The right of self-defense and Article 51 of the United Nations Charter.

Buckle. Up. ■

2. On August 1, 1951, the UN Security Council met to discuss "Restrictions imposed by Egypt on the passage of ships through the Suez Canal" bound for Israel.

FIVE HUNDRED AND FIFTIETH MEETING

Held at Flushing Meadow, New York, on Wednesday, 1 August 1951, at 11 a.m.

CINQ CENT CINQUANTIEME SEANCE

Tenue à Flushing Meadow, New-York, le mercredi 1er août 1951, à 11 heures.

President: Mr. Warren R. AUSTIN (United States of America).

Present: The representatives of the following countries: Brazil, China, Ecuador, France, India, Netherlands, Turkey, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

Provisional agenda (S/Agenda 550)

1. Adoption of the agenda.
2. The Palestine question:
   (*a*) Restrictions imposed by Egypt on the passage of ships through the Suez Canal (S/2241).

Président: M. Warren R. AUSTIN (Etats-Unis d'Amérique).

Présents: Les représentants des pays suivants: Brésil, Chine, Equateur, France, Inde, Pays-Bas, Turquie, Union des Républiques socialistes soviétiques, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Etats-Unis d'Amérique, Yougoslavie.

Ordre du jour provisoire (S/Agenda 550)

1. Adoption de l'ordre du jour.
2. La question palestinienne:
   a) Restrictions imposées par l'Egypte au passage des navires par le canal de Suez (S/2241).

3. Mahmoud Fawzi, Egypt's UN representative, claimed that a state of war still existed between Egypt and Israel, despite their 1949 General Armistice Agreement, and that Egypt retained its belligerent right to visit and search neutral vessels for war materials.

21. I shall not recapitulate all I said in this connexion at our [*549th*] meeting on 26 July when, referring to precedent and jurisprudence, I showed in chapter and verse that "armistices... are all agreements between belligerent forces for a temporary cessation of hostilities," that "they are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals, on all points beyond the mere cessation of hostilities," and, finally, that "In spite of such cessation (of hostilities) the right of visit and search over neutral merchantmen therefore remains intact...". These are not my words but the words of jurists which I have quoted before and which I am quoting in part today.

4. Fawzi grounded this right in "the right of self-preservation and self-defence, which ... transcends all other rights," and even hinted that Article 51 of the UN Charter may not limit the right of self-defense.

33. While this prevails, and, particularly in view of the continuance of the — shall I euphemistically say "indiscretion" of Israel, or shall I frankly call them by their name and say "violations and contraventions by Israel" — particularly in view of the continuance of these, Egypt has no lesser right, no lesser duty and no other choice than to exercise its right of self-preservation and self-defence, which, as I submitted before, transcends all other rights.

34. Oppenheim [4] tells us that "From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States", and he proceeds to

5. And then ...

... it happened.

Fawzi quoted Hans Kelsen ...

... suggesting that the right of self-defense was ...

jus cogens.

A peremptory norm of general international law that "cannot be affected by any treaty," not even the Charter.

40. Kelsen tells us in *The Law of the United Nations* that:

> "Although the right of self-defence is supposed to be established by a rule of general international law which has the character of '*jus cogens*' so that it cannot be affected by any treaty, it has been considered not as superfluous to stipulate this right expressly in the Charter. Neither the Covenant of the League of Nations nor the Pact of Paris contained an analogous provision."

At another point, Kelsen says that:

> "The right of self-defence ... is the right of an individual, or a state, to defend his person, property, or honour against a real or imminent attack. It is a right of the attacked or threatened individual or state, and of no other individual or state. Article 51 confers the right to use force not only upon the attacked state but also upon other states which unite with the attacked state in order to assist it in its defence."

6. THIS WAS THE FIRST MENTION OF JUS COGENS IN THE SECURITY COUNCIL EVER.***

*99% sure about this.

**Today, self-defense is not widely considered jus cogens.

7. Sir Gladwyn Jebb, the U.K. representative, replied that Article 51 acknowledges a right to defend against "unprovoked aggression."

But Egypt was not "even" under any imminent threat of attack from Israel.

So Egypt could not exercise belligerent rights over neutral shipping.

93. The Egyptian case, as presented by our colleague, Mahmoud Fawzi Bey, not unnaturally tends to rest on the so-called right of self-preservation. This right, at any rate to my delegation, seems to be a very vague conception. Obviously States have a right to preserve themselves, if by that is meant to defend themselves in the face of unprovoked aggression. This right is clearly acknowledged in Article 51 of the Charter, which incidentally lays down that it can only be exercised until the Security Council has taken the measures necessary to maintain international peace and security. Where we differ from the representative of Egypt is when he asserts, if in fact he does, the right of his country to apply considerations of self-defence in the present case. If Egypt were involved in actual hostilities, it would no doubt be justified in taking measures for its own defence. This is not, however, the situation at the present time.

(Sidenote: Gladwyn Jebb was Acting UN Secretary-General from October 1945 to February 1946, until the appointment of the first Secretary-General, Trygve Lie).

8. Exactly one month later, Security Council Resolution 95 adopted the U.K. position and called upon Egypt to end its restrictions.

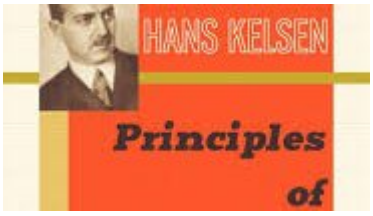
Considering **that since the armistice régime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self defence,**

9. The following year, Fawzi was appointed Ambassador ... to the United Kingdom.

He later became Foreign Minister under Nasser, then Prime Minister and Vice President under Sadat.

10. In 1952, Hans Kelsen published Principles of International Law.

He did not mention Fawzi's speech.



11. Kelsen wrote that the Charter "must stipulate" the right of self-defense, and "restricts" the right to cases of armed attack, before the Security Council intervenes.

That doesn't sound like a rule that "cannot be affected by any treaty."

help. An express provision permitting self-defense is necessary only within a legal order which generally prohibits the use of force on the part of the members of the legal community constituted by this order. Hence the Covenant of the League of Nations and the Kellogg-Briand Pact did not and need not contain such a provision. Under the Covenant, which did not prohibit reprisals and prohibited war only under definite conditions, self-defense exercised by counterwar against an illegal war was not among these conditions. Under the Kellogg-Briand Pact, which likewise did not prohibit reprisals, self-defense by counterwar against an illegal war was included in the clause of the preamble permitting war against a violator of the pact. However, the Charter of the United Nations, which establishes a centralized force monopoly of the

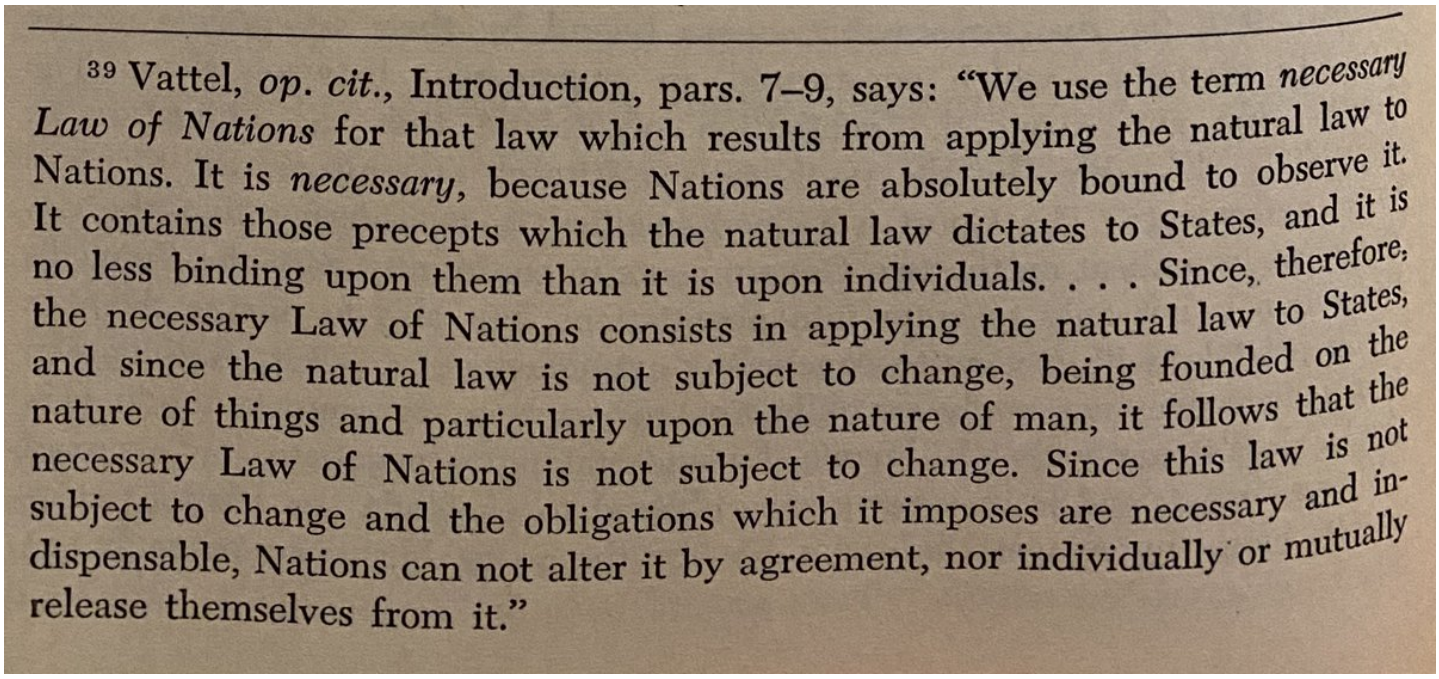
12. Later, Kelsen wrote that "it can hardly be denied" that States *may* renounce the right to protect their own citizens. But this may be a typo.

treaties which are at variance with universally recognized principles of international law are null and void. But they do not and cannot precisely designate the norms of general international law which have the character of *jus cogens*, that is to say, the application of which cannot be excluded by a treaty. It is probable that a treaty by which two or more states release one another from the obligations imposed upon them by the norm of general international law prohibiting occupation of parts of the open sea, will be declared null and void by an international tribunal competent to deal with this case. But it can hardly be denied that states may by a valid treaty renounce in their mutual relations the right of exercising protection over their own citizens, a right conferred upon them by general international law.[39]

(2) THE SUBJECTS UPON WHOM TREATIES ARE BINDING. As far as

13. Now look at the footnote.

Hans Kelsen, legendary positivist, cites Vattel for the claim that States cannot contract out of the "necessary law of nations" ... which is an application of *natural law*. What?



[39] Vattel, *op. cit.*, Introduction, pars. 7–9, says: "We use the term *necessary Law of Nations* for that law which results from applying the natural law to Nations. It is *necessary*, because Nations are absolutely bound to observe it. It contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. . . . Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it."

14. By the way, Kelsen also wrote that the UN Charter may have "repealed" the law of neutrality among its members, and that the Charter may constitute general international law even though it's not universally ratified.

If it is assumed that under the Kellogg-Briand Pact reprisals against a violator of the pact, the fulfillment of the obligations stipulated by Article 16, paragraphs 1 and 3 of the Covenant, and Article 2, paragraph 5 of the Charter, as well as the exercise of the right of collective self-defense by the taking of measures short of war against the aggressor under Article 51 of the Charter, that all these actions do not constitute a violation of the obligations of neutral states established by general international law, it must also be assumed that the norms of general international law concerning these obligations are only *jus dispositivum* ("yielding law"), not *jus cogens* ("cogent law"),[48] that is to say, that they may be repealed by treaty provisions in the relation among the contracting parties.

Insofar as the above-quoted provisions of Article 2, paragraph 5, Article 39, and Article 51 of the Charter, in virtue of Article 2, paragraph 6, apply also to nonmember states, their validity may be doubted, except if it is assumed that the Charter—in spite of being a treaty to which not all the states are contracting parties—has the character of general international law.[49] Under this assumption the legal institute of neutrality has to be considered as abolished. To the extent that the distinction between war as delict and war as sanction is sustained, and collective security is established within a universal organization, the fundamental principle of the legal institution of neutrality—indiscriminative impartiality toward the belligerents on the part of states not actually involved in a war between other states—cannot be maintained.

15. As for Egypt, it insisted throughout the drafting of the Definition of Aggression that there is no right of self-defense outside of Article 51. (1968, 1972)

of aggression, namely armed aggression. The introduction into the concept of armed aggression of a reference to the indirect use of force would have dangerous consequences and would also be in conflict with Article 51 of the Charter which made the resort to the right of self-defence dependent on the occurrence of armed attack. Any departure from the strict wording of Article 51 would be a retrograde step. That danger had been recognized by the sponsors of the thirteen-Power proposal (ibid., para. 9), and operative paragraph 8 made due provision for it. Any departure from that principle would be a regression to the pre-Charter era, when the prohibition of the use of force in international relations was not so strict and categorical as it was subsequent to its express proclamation in the Charter. His delegation had been heartened by the excellent juridical analysis of that point by the Mexican representative (1075th meeting).

(For more on the Definition of Aggression, see https://t.co/5HXUrP4K9s)

16. So either self-defense was never jus cogens, or it was and article 51 codified it, or it was but the Charter modified it ... because the Charter is jus cogens.

And the Charter can only be jus cogens if it's general international law ... just as Hans Kelsen suggested. #Legend



17. Or, maybe, by 1968, Egypt had a political motive to wrap itself in the Charter. Who can say?

32. The Israel representative's statement provoked serious concern, because it implied that aggression could legimitately be committed in the guise of self-defence. In other words, the Israel representative was suggesting that the Sixth Committee should accept the proposition that self-defence could mean

18. Anyway, this has been your sip of jus cogens for the day.

Stay safe. Be kind.